United States Court of Appeals

for the Second Circuit

APPELLEE’S BRIEF

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76-1457

To be argued by
VICTOR J. ROCCO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1457

UNITED STATES OF AMERICA,
Appellee,

—against—

PAUL WILLIAMS,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
VICTOR J. ROCCO,
Assistant United States Attorneys,
Of Counsel.

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BRIEF FOR THE UNITED STATE.

Preliminary Statement

Paul Williams appeals from a judgment of the United States District Court for the Eastern District of New York (Bramwell, *J.*), entered on October 1, 1976, convicting him, following a jury trial, of possession of cocaine with intent to distribute and distribution of the same (Counts One and Two) and possession of heroin with intent to distribute and distribution of the same (Counts Five and Six), all in violation of 21, United States Code, Section 841(a)(1) and 18, United States Code, Section 2. The charges rose out of separate direct sales of quantities of cocaine and heroin to an undercover agent of the Drug Enforcement Administration Task Force. Appellant was sentenced to concurrent terms of ten years imprisonment plus a seven year special parole term on each count. Appellant has been admitted to bail pending a determination of this appeal.

On this appeal, appellant assigns error to the judgment of the district court and urges that the conviction be reversed. Specifically, he assails the judgment below on the ground that the trial court, in an otherwise faultless charge to the jury, committed plain error because it included "natural and probable consequences" language in its instructions on the issue of intent. As an independent and further ground for relief, appellant argues that since the "possession" counts (One and Five) and the "distribution" counts (Two and Six) purportedly merge, the identical concurrent sentences the court imposed on each count following conviction should be vacated and the matter remanded for resentencing on either the "possession" or "dist ibution" counts.

Statement of the Case

On May 18, 1976, an indictment was returned by a Grand Jury sitting in the Eastern District of New York charging appellant and one David White, in four counts of a six count indictment, with violations of the federal narcotics laws.[1]

A. The Facts

The uncontradicted evidence adduced at trial established that on April 19, 1974 and again on July 10, 1974 Paul Williams sold narcotics to an undercover agent of the Drug Enforcement Administration Task Force.

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[1] The indictment superseded an identical six count indictment filed against Williams and White in February, 1974. Counts Three and Four name White alone for his role in an undercover heroin sale in May of 1974. Those counts were dismissed at the time of White's sentence, on his plea of guilty to Count One of the superseding indictment, to four years imprisonment plus a five year special parole term.

Detective Octavio Pons, the Government's principal witness, testified that pursuant to prior arrangements, he met with David White and an individual later identified as Lance Hartgrove[2] on Jamaica Avenue and 162nd Street in Jamaica, Queens on the evening of April 18, 1974 to purchase an ounce of heroin. (T. 44-45, 51; TT. 19).[3]

At White's direction, Detective Pons drove to a nearby apartment (T. 51; TT. 19), then on to the vicinity of the Franklyn Arms Hotel, 89th Avenue and 163rd Street, where White and Hartgrove were to meet their "connection". (T. 53). While Pons waited in his car, White and Hartgrove proceeded toward the hotel. A short time later Hartgrove returned to the car, explained there would be some delay and asked Pons to join him at the Scorpio Bar in the basement of the hotel while they waited. Pons agreed and accompanied Hartgrove to the Scorpio where they were subsequently joined by White. (T. 53-54; TT. 21). After a short time at the bar, the three returned to the street where White and Hartgrove left Pons and reentered the hotel in search of their "source." When they returned, White told Pons there would be a further delay since the connection had locked himself out of his "stash pad" in the hotel and was awaiting delivery of a spare key. (T. 56; TT. 22-23). At that point, White, accompanied by Detective Pons, proceeded to his girlfriend's house leaving Hartgrove behind to monitor developments at the hotel. (T. 57-58; TT. 23-24).

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[2] Lance Hartgrove subsequently pleaded guilty to possession of heroin with intent to distribute. Judge Bramwell sentenced him to a prison term of four years plus a five year special parole term for his role in the transaction.

[3] Since the trial transcript is not consecutively paginated parenthetical references preceded by "T" refer to the transcript of proceedings dated July 14, 1976; "TT" refers to the transcript of proceedings dated July 15, 1976.

On their return to the Franklyn Arms, White left Detective Pons on the street while he and Hartgrove entered the hotel to meet the connection. (T. 59-60; TT. 26). When they returned they were accompanied by Williams. (T. 60; TT. 27). White approached Detective Pons, advised him that the "connection" had the heroin and that the deal was to be effected in Detective Pons' car. (T. 61). Pons, Hartgrove and White, now accompanied by Williams, walked down 163rd Street to the car. While Williams stood outside, the others entered the car: Hartgrove took a seat in the rear, White a seat in the front and Detective Pons occupied the driver's seat. White lowered his window, took a clear plastic bag containing the heroin from Williams and passed it to Detective Pons who handed White $1500 in return. (T. 61-63, TT. 30-32). After counting the money, White and Hartgrove joined Williams outside the car and walked toward the hotel. (T. 63). A few minutes later, White returned to the car and proceeded to a nearby diner, where Detective Pons left him.

Detective Pons again met Williams following the heroin sale. He testified that on July 9, 1974, shortly before midnight, he met with David White at the Scorpio bar, this time to purchase an eighth kilogram of cocaine. White advised Pons that the "connection" was around the corner at the "Day After Lounge" and suggested that they meet with him there. (TT. 6, TT. 35). Accompanied by an unidentified female, they proceeded to the "Day After Lounge" where, on entering, Detective Pons recognized Paul Williams seated at the opposite end of the bar engaged in conversation. (TT. 7, TT. 35-38). White walked over to Williams, spoke with him briefly then the two returned to Detective Pons. Williams told Pons that his partner had become impatient and had left with the cocaine. When Pons agreed to the $4,500.00 price which Williams had quoted, Williams said the drugs would be available within a half hour. (TT. 8; TT. 39).

Wiilliams then left the premises, placed a call and returned a short time later, indicating that his partner would be delivering the drugs shortly. (TT. 9, TT. 38). Following a brief conversation about the quality of the heroin he had sold Detective Pons in April and the cocaine to be delivered that night. Williams returned to his female companion at the bar. (TT. 9, TT. 41). A short time later, appellant Williams walked to the door apparently to await his partner's arrival and was subsequently observed meeting with an unidentified male at the door, exiting the premises and briefly ducking into a nearby doorway or alley. (TT. 65; TT. 79-80). When Williams returned to the bar, he asked Detective Pons and White to accompany him to the men's bathroom in the basement.

Once downstairs, Williams produced a plastic bag containing what was subsequently identified as a mixture of cocaine and lactose (T. 33, T. 38, T. 40, T. 41) and handed it to Detective Pons. (TT. 10, TT. 40). Pons asked Williams and White to accompany him to his car for payment. (TT. 10-12, TT. 40). The three men then left the premises and proceeded across the street to Detective Pons' car. (TT. 12-13). Pons opened the trunk to retrieve the $4,500.00, entered the car and admitted appellant and White. At Williams' direction, Pons drove around the corner to 161st Street and 91st Avenue where he paid Williams the $4,500.00 purchase price (TT. 13).[4]

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[4] The Government called two additional witnesses. Joseph Barbato, a chemist for the Drug Enforcement Administration, identified the substances purchased by Detective Pons on April 19, 1974 and July 10, 1974 as mixtures of heroin and cocaine, respectively. (T. 25-40). Detective Kenneth Bernhardt of the New York City Police Department testified to his surveillance observations on April 19th and July 10th that corroborated many of the particulars of Detective Pons' testimony. (TT. 45-88). Though Bernhardt testified to seeing Williams in the "Day

[Footnote continued on following page]

B. The Charge

Following some general cautionary instructions and a reading of the relevant counts of the indictment, the jury was instructed first on the law applicable to possession with intent to distribute, Counts One and Five (AA 10-11, AA 14-16)[5] then on the law applicable to the distribution of controlled substances, Counts Two and Six (AA 18, AA 22-23). Consistent with the Government's proof at trial, as well as the indictment charging violations of 18 U.S.C. § 2, the court's instructions on the four counts submitted to the jury included a detailed charge on aiding and abetting. (AA 11-14, AA 18-22).[6]

After Lounge" on July 10th and leaving the bar with Pons later that night (TT. 63-65), he could identify only White and Hartgrove as participants in the heroin sale outside the Franklyn Arms. Poor lighting conditions on 163rd Street that night prohibited a positive identification of the third male (TT. 55, TT. 75-76).

[5] Page references preceded by "AA" refer to the trial court's charge as it appears in the paginated portions of the Appellant's Appendix.

[6] Appellant's representations to the contrary notwithstanding (Brief for Appellant, pp. 6 & 9), the principal theory of the government's case and the evidence adduced at trial point to guilt as a principal. The evidence established that Williams actually possessed the narcotics in sufficient quantities to infer an intent to distribute, *United States* v. *Luciow*, 518 F.2d 298 (7th Cir. 1975), for some time prior to the sales and in each instance actually distributed narcotics to another: on April 19, 1974 to David White preceding delivery to Detective Pons (21 U.S.C. § 802(8) & (11); Cf. *United States* v. *Masullo*, 489 F.2d 217, 221 (2d Cir. 1973); and, on July 10, 1974, directly to Detective Pons. That consistent with the government's proof the trial judge charged the jury on an alternative theory of aiding and abetting does not, as appellant would have it, *a fortiori*, eliminate guilt as a principal. Indeed, under these circumstances, the case should be submitted to the jury on both theories. *United States* v. *Taylor*, 464 F.2d 240 (2d Cir. 1972).

In charging the jury on the requisite intent necessary to support a conviction pursuant to 21 U.S.C. § 841(a)(1), the district court instructed that in each instance the defendant must either have possessed the narcotics with a specific intent to distribute them (AA 15-16) or actually distributed the narcotics knowingly and intentionally. (AA 23). Instructing the jury on the elements of aiding and abetting, the court on two separate occasions charged, in part:

> In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. (AA 12, AA 19).
>
> * * * * *
>
> In order to aid and abet another to commit a crime it is necessary that the accused willfully associated himself in some way with the criminal venture and willfully participate in it as he would in something he wishes to bring about; that is to say that he willfully seek by some act or omission of his to make the criminal venture succeed. (AA 13, AA 20).
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> * * * * *
>
> An act or a failure to act is "willfully" done, if done voluntarily and intentionally, and with the specific intent to do something that the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. (AA 13, AA 14, AA 20, AA 21).
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> * * * * *

Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator. (AA 14, AA 21).

To determine whether a defendant aided and abetted the commission of an offense, you ask yourselves these questions: Did he associate himself with the venture? Did he participate in it as something he wished to bring about? Did he seek by his action to make it succeed? If he did, then he is a aider and abettor. (AA 14, AA 22).

In defining the specific intent necessary to support a conviction, on either a principal or aider and abettor theory, the trial court further charged:

"*Definition of Specific Intent*"

This is applicable to all offenses charged in the indictment.

The crimes charged in this case are serious crimes which require proof of specific intent before a defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the Government must prove that a defendant knowingly did an act with [sic] which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Intent ordinarily may [sic] be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the sur-

> rounding circumstances. You may consider any statement made and act done or omitted by a defendant, and all other facts and circumstances in evidence which indicate his state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.[7] (AA 34, AA 35).

There were no exceptions to the charge as given. (AA 53).

POINT I

The court's charge on the issue of intent does not constitute reversible error.

Appellant initially contends, notwithstanding the absence of an objection to the charge as given, that the trial court's use of "natural and probable consequences" language twice during its instructions on the issue of intent constitutes reversible error. Viewed in its entirety, as it must be, the court's charge did not improperly shift the burden of proof to the defendant; hence, it did not rise to the level of plain or constitutional error. Absent an objection to the charge as given, the judgment of conviction should be affirmed.

Though this Court has expressly disapproved of the use of "natural and probable consequences" language in instructions to the jury, see *United States* v. *Bertolotti*,

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[7] During additional instructions on the issues of knowledge and intent, the court again charged the jury in terms of "natural and probable consequences:"

> As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable, or ordinary, consequences of his act. (AA 39).

529 F.2d 149 (2d Cir. 1975), *citing*, *United States* v. *Barash*, 365 F.2d 395, 402, 403 (2d Cir. 1966), the conviction will be set aside only where the fair import of the charge taken as a whole, *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973), is to shift the burden of proof on the issue of intent from the prosecution to the defendant. See *United States* v. *Robinson*, — F.2d —, Slip Op. 445, 451-454 (2d Cir., November 10, 1976); *United States* v. *Erb*, — F.2d —, Slip Op. 49, 65 (2d Cir., October 1, 1976). Manifestly, the trial court's charge here did not have that effect.

To begin with, the trial judge gave additional instructions to the jury on the issue of intent, contrasting specific with general intent (AA34) and clearly defining the government's burden: "[T]o establish specific intent, the government must prove that a defendant knowingly did an act with [sic] which the law forbids, purposely intending to violate the law." (*Id.*). Indeed, the court was specific in its use of the term throughout the charge, admonishing the jury time and again that the term connotes a bad purpose. (AA12, AA14, AA19, AA20, AA21, AA34). Given such clear and unequivocal instructions, it hardly follows, as appellant contends, that the government's burden on the "possession" counts was satisfied by proof of mere possession; nor, on a parity of reasoning, can it be said that in considering the issue of guilt on an aiding and abetting theory the jury was left with erroneous impression that the government's burden was satisfied by proof of the sale alone. To the contrary, the jury was instructed on at least six occasions that to sustain a conviction for aiding and abetting it must find that the defendant "willfully associated himself in some way with the criminal venture and willfully participated in it as he would in something he wished to bring about."

(AA13, AA20). Under the circumstances, the jury unquestionably was not misled. See *United States* v. *Erb*, — F.2d —, Slip Op. 49, 63 (2d Cir., October 1, 1976).[8]

In view of the trial court's direct and specific instructions on the issue of intent, any error inherent in its isolated use of "natural and probable consequences" language was vitiated. The most serious criticism that can be levelled against the charge, under these circumstances, is that its language is general and abstract and its meaning unclear. *United States* v. *Cohen*, 378 F.2d 751, 758 (9th Cir. 1967). Where, as here, the instructions taken as a whole fairly submit the case to the jury, this, alone, is not grounds for reversal. *Id;* see also, *United States* v. *Guy*, 456 F.2d 1157 (8th Cir.), *cert. denied*, 409 U.S. 896 (1972).

Other factors sharply distinguish the present case from those instances where the use of the "natural and probable consequences" charge has been held to constitute plain error. Thus, unlike the situation in *United States* v. *Barash*, *supra*, 365 F.2d at 402, and more recently in *United States* v. *Robinson*, *supra* at 451, the charge here did not include the phrase "unless the contrary appears from the evidence." In *Robinson* this Court

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[8] As if that were not enough, the jury was instructed, in one form or another, on at least eleven occasions that the burden of proof as to each and every element of the crimes charged rests with the government, and on at least six separate occasions that the defendant has no burden. Curative language to this effect uniformly has been held to dissipate the harmful effects of the natural and probable consequence charge even where it is accompanied by "burden shifting" language, "unless the contrary appears from the evidence." *Infra* at pp. 11-12. See *United States* v. *Beasley*, 519 F.2d 233, 244 (5th Cir. 1975); *Moore* v. *United States*, 375 F.2d 877, 880-81 (8th Cir.), *cert. denied*, 389 U.S. 844 (1967).

held that that phrase exacerbates the error inherent in the "natural and probable consequences" charge. *Id.* at 453. As Judge Friendly recognized in *United States* v. *Barash*, *supra*, 365 F.2d at 402, this reference to contrary evidence is the most misleading since it refers "presumably [to] evidence the defense would have to produce." *Id.* See *Mann* v. *United States*, 319 F.2d 404, 409 (5th Cir. 1963), *cert. denied*, 375 U.S. 986 (1964); and it is precisely the corollary of that principle, *i.e.*, that the prosecution does not bear the burden of proof beyond a reasonable doubt as to every element of the offense, that runs afoul of due process strictures, escalating the error inherent in the charge to constitutional dimension. See *United States* v. *Robinson*, *supra* at 453, *citing*, *Mullany* v. *Wilbur*, 421 U.S. 684 (1975); *United States* v. *Wilkinson*, 460 F.2d 725, 730-31 (5th Cir. 1972).

Finally, the overwhelming evidence on the issue of specific intent renders any error in the court's charge harmless. See *United States* v. *Anderson*, 523 F.2d 1192, 1197 (5th Cir. 1975); *Moore* v. *United States*, 375 F.2d 877, 881, n.3 (8th Cir.), *cert. denied*, 389 U.S. 844 (1967). To begin with, the evidence relating to the April 19th sale established that Williams had a cache of heroin locked away in a "stash pad" inside the hotel; and the sale, when finally effected, was surreptitiously made inside a car on a dark street. Coupled with Williams' efforts to preserve his anonymity and complete the transaction as quickly as possibly, the requisite bad purpose to disobey the law seems plain. The same is true with respect to the cocaine sale in July when, among other things, Williams insisted that the sale be effected in a remote restroom in the basement of the bar.

It follows that while specific intent unquestionably is an element of the offense charged, unlike those instances where state of mind is in issue, it simply was not a crucial issue in this case. See *United States* v. *Wilkinson*,

460 F.2d 725, 733 (5th Cir. 1972); cf. *United States* v. *Robinson, supra; United States* v. *Barash, supra,* 365 F.2d 395. Indeed, throughout its cross-examination and in its closing remarks to the jury, the defense proceeded on the issues of credibility and identity. Under the circumstances, Williams clearly was not prejudiced by the charge.

POINT II

Appellant's Convictions Under the Indictment Do Not Merge

Appellant contends that since his convictions under the "possession" counts (One and Five) and the "distribution" counts (Two and Four) purportedly merge, the identical concurrent sentences the court imposed on each count following conviction should be vacated and the matter remanded for resentencing on either the "possession" or the "distribution" counts. We disagree because each count of the indictment requires proof of a fact the others do not, the convictions do not merge. The judgment of the district court should be affirmed.

Generally, a person may be convicted of two different crimes arising out of the same transaction as long as each crime requires proof of a fact that the other does not. *Blockburger* v. *United States,* 284 U.S. 299 (1932); *Perkins* v. *United States,* 526 F.2d 688 (5th Cir. 1976); *United States* v. *Cedar,* 437 F.2d 1033 (9th Cir. 1971). Under § 841(a)(1), the charge of possession with intent to distribute does not require proof of distribution, while the distribution charge does not require proof of possession. *United States* v. *Stevens,* 521 F.2d 334, 337 (6th Cir. 1975). Indeed, in an analogous situation involving possession and distribution of counterfeit stamps, *United States* v. *Cioffi,* 487 F.2d 429 (2d

Cir. 1973), this Court has held that the crimes did not merge:

> Although it would be rare for a seller not to have at least constructive possession, such a case is conceivable, e.g., if A, a middleman, sells B counterfeit owned by and in possession of C, and the contraband is delivered directly to B by C. *Id.* at 496.

The crimes of possession of narcotics with intent to distribute and distribution are likewise separate crimes, each requiring proof of a fact that the other does not. Since proof of the one does not automatically prove the other, the convictions do not merge. *United States* v. *Horsley*, 519 F.2d 1264, 1265-66 (5th Cir. 1975).

The cases appellant cites in support of his claim to the contrary are plainly distinguishable. In three of them, *United States* v. *Stevens, supra; United States* v. *Curry*, 512 F.2d 1299, 1306 (4th Cir. 1975), and *United States* v. *Atkinson*, 512 F.2d 1235 (4th Cir. 1975), the courts held that where there is no evidence of possession with intent to distribute a controlled substance apart from evidence of the actual distribution, the offenses merge. Applying that standard to the present facts, the offenses are clearly distinct as there was ample independent evidence that Williams possessed the narcotics well before their actual distribution.

Prince v. *United States*, 352 U.S. 322 (1956), is also distinguishable. There, the defendant was charged with robbery of a federally insured bank and entry into the bank with intent to commit a felony, both in violation of Title 18, United States Code, Section 2113. Construing the Federal Bank Robbery Act, the Supreme Court held

that the two crimes merged under the statute. But as the Court recognized in *Prince*, there are indeed instances where separate convictions do not merge, though they arise out of the same operative facts. 352 U.S. at 328, n. 9. See also *United States* v. *Meduri*, 457 F.2d 330 (2d Cir. 1972); *United States* v. *DeStafano*, 429 F.2d 344, 348 (2d Cir. 1970).[9]

Finally, this Court, in *United States* v. *Vasquez*, 468 F.2d 565 (2d Cir. 1972), on facts close to these, refused to reach the broader issue of statutory construction and in the exercise of its discretion affirmed convictions under the concurrent sentence doctrine for both possession of narcotics with intent to distribute and distribution. In *Vasquez*, as here, there was no spillover which could have prejudiced the defendant in any way and the defendant was sentenced to concurrent sentences well within the maxim permitted by law. Under the circumstances, this Court should not reach the issue of statutory construction and judgment of conviction should be affirmed under the concurrent sentence doctrine.

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[9] *United States* v. *Howard*, 507 F.2d 559 (8th Cir. 1974), is likewise inapposite. In *Howard*, the court held that a defendant could not be convicted of both distribution and the lesser included offense of simple possession. Since possession with intent to distribute is not a lesser included, but a separate and distinct offense, *Howard* has no application.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: March ..., 1977

Respectfully submitted,

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COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

Joanne Bracco being duly sworn,

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That on the 8th day of March 1977 he served a copy of the within

BRIEF FOR THE UNITED STATES

by placing the same in a properly postpaid franked envelope addressed to:

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509 U.S. Courthouse
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New York, N.Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Joanne Bracco

Sworn to before me this

8th day of March 1977

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4613298
Qualified in Queens
Term Expires March 30, 1977